84-1458

Office - Supreme Court, U.S.
FILED
MAR 14 1985
ALEXANDER L. STEVAS,
CLERK

No._____

In The
Supreme Court of the United States
October Term, 1984

KMA, INC.

Petitioner,

vs.

CITY OF NEWPORT NEWS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

ARTHUR M. SCHWARTZ, P.C.
Arthur M. Schwartz
1650 Market Street
Denver, Colorado 80202
(303) 893-2500

Attorney for Petitioner

54 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER NEWPORT NEWS CITY CODE SECTION 27-4(2) WHICH PROHIBITS PROPERTY OWNERS FROM KNOWINGLY LEASING OR ALLOWING THEIR PREMISES TO BE USED FOR THE EXHIBITION OF OBSCENE MATERIAL IS AN UNCONSTITUTIONAL PRIOR RESTRAINT OF EXPRESSION IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO CONSOLIDATE THE THIRTY-THREE CHARGES AGAINST PETITIONER INTO ONE CHARGE WHERE PETITIONER ENTERED INTO ONLY ONE LEASE WITH A TENANT WHO EXHIBITED OBSCENE MATERIALS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
I. NEWPORT NEWS CITY CODE SECTION 27-4(2), BOTH ON ITS FACE AND IN ITS APPLICATION, CREATES AN INFORMAL SYSTEM OF PRIOR RESTRAINT BY REQUIRING LANDLORDS TO REGULATE THE CONTENTS OF A TENANT'S STOCK OF PRESUMPTIVELY PROTECTED SPEECH MATERIALS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	5
II THE TRIAL COURT DENIED PETITIONER'S MOTION TO CONSOLIDATE THE THIRTY-THREE INDICTMENTS INTO A SINGLE INDICTMENT IN VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY	17
CONCLUSION	23

APPENDIX INDEX

Opinion of the Virginia Supreme Court A1
Order Denying Petition for Rehearing A11
Motion to Dismiss A12
Motion to Consolidate A14
Transcript of Hearing on Motion to Dismiss and Motion to Consolidate, March 25, 1983, Newport News Circuit Court A16

TABLE OF CASES

Page

Adult Bookmart, Inc. v. State,
152 Ga.App. 838, 265 SE2d 273 (1979) 21

American Civil Liberties Union v. City of Pittsburgh,
586 F.Supp. 417 (W.D. Penn. 1984) 11

Bantam Books, Inc. v. Sullivan,
372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) 6, 9, 11, 16

Bell v. United States,
349 U.S. 81, 99 L.Ed. 905, 75 S.Ct. 620 (1955) 18, 19, 20

Blockburger v. United States,
284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 20

Blount v. Rizzi,
400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) 6

Brown v. Ohio,
432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) 19, 20, 22

Carroll v. Princess Anne,
383 U.S. 175, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968) 6

Commonwealth v. Beacom Distributors,
14 Mass.App. 577, 441 NE2d 541 (1982) 22

Freedman v. Maryland,
380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734
(1965) 9, 15, 16

Heller v. New York,
413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789
(1973) 5, 16

Marcus v. Search Warrant,
367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) 6

Maxwell v. State,
152 Ga.App. 776, 264 SE2d 254 (1979) 22

Miller v. California,
413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, *reh. denied*,
414 U.S. 881 (1973) 5

Near v. Minnesota ex rel. Olson,
283 U.S. 657, 51 S.Ct. 625, 75 L.Ed. 1357
(1931) 6, 7, 9, 17

New York Times Co. v. United States,
403 U.S. 713, 29 L.Ed.2d 822, 81 S.Ct. 2140 (1971) .. 6, 9

Organization for a Better Austin v. Keefe,
402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1975) 6, 9

Penthouse Int'l, Ltd. v. McAuliffe,
610 F.2d 1353 (5th Cir. 1980) 11

Playmate Cinema, Inc. v. State,
154 Ga.App. 871, 269 SE2d 883 (1980) 22

Roaden v. Kentucky,
413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973) 5

Roth v. United States,
354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) .. 5, 6

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 7, 11, 15, 16

Speiser v. Randall,
357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958) 7

State v. Andrews,
108 Conn. 209, 142 A. 840 20

State v. Carlson,
291 Minn. 442, 192 NW2d 421 (1971) 22

State v. Cimino,
33 Conn.Sup. 681, 366 A.2d 1168 (1976) 20

State of Louisiana v. Franzone,
384 So.2d 409 (La. 1980) 1, 12, 13, 15, 16, 23

State v. Getman,
293 Minn. 11, 195 NW2d 827 (1972) *vacated on other grounds*, 413 U.S. 912 (1973) 22

State v. Hungerford,
278 So.2d 33 (La. 1973) 20

Vance v. Universal Amusement Co.,
445 U.S. 708, 63 L.Ed.2d 413, 100 S.Ct. 1156 (1980) 8, 14, 15

Statute and Rules

United States

28 U.S.C., Section 1257(3) 1
U.S. Const., Amend I 2
U.S. Const., Amend. V 2
U.S. Const., Amend. XIV 2

Virginia

Newport News Code Section 27-4(2) 2, 5, 17

OPINIONS BELOW

The Virginia Supreme Court affirmed the judgment of the trial court on November 30, 1984. The opinion in this case appears at 323 SE2d 78, 228 Va. _____ (1984). *See* Appendix pp. A1-A11. A petition for rehearing was denied on January 18, 1985 and notice of this ruling appears in the Appendix at p. A11.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C., Section 1257(3) for review by certiorari of the judgment and opinion of the Virginia Supreme Court. A written opinion was issued by the Court on November 30, 1984. Petitioner, KMA, Inc., filed a petition for rehearing which was denied by order of the court on January 18, 1985.

Petitioner seeks review of the Virginia Supreme Court's decision upholding the validity of a Newport News, Virginia ordinance challenged as violative of the First and Fourteenth Amendments to the United States Constitution. In addition, Petitioner seeks review of the Virginia Supreme Court's determination that Petitioner's Fifth Amendment right against double jeopardy was not violated by the Petitioner's conviction on thirty-three violations of the challenged ordinance. Pursuant to 28 U.S.C. Section 1257(3), Petitioner is entitled to seek review of the judgment of Virginia's highest court by a writ of certiorari.

Moreover, this petition for writ of certiorari should be afforded careful consideration pursuant to Rule 17.1(b) of the Rules of the Supreme Court. In the instant case, the Virginia Supreme Court decided a significant federal constitutional question in direct conflict with the Louisiana

Supreme Court's resolution of the same issue in *State v. Franzone*, 384 So.2d 409 (La. 1980). In addition, the Virginia Supreme Court's decision upheld a system of prior restraint in conflict with the consistent decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One

> Congress shall make no law ... abridging the freedom of speech, or of the press ...

United States Constitution, Amendment Five

> ... [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...

United States Constitution, Amendment Fourteen

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Newport New City Code Section 27-4(2)

> It shall be unlawful for any person to knowingly: ... (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

STATEMENT OF THE CASE

The Petitioner, KMA, Inc., is a Pennsylvania Corporation that owns the premises described as 13772 Warwick Boulevard in Newport News, and who leases those premises to Wall Distributors, Inc. The lessee, Wall Distributors, operates an adult bookstore known as the "Book Boutique" at that location.

At its criminal term commencing on November 8, 1982, the grand jury in the Circuit Court for the City of Newport News charged KMA in 33 separate indictments with the violation of Section 27-4(2) of the Newport News City Code. That section provides:

> It shall be unlawful for any person to knowingly:... (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

Before trial, KMA moved to dismiss the indictments on the basis that Newport News Ordinance Section 27-4(2) imposed a prior restraint of presumptively protected speech in violation of the First and Fourteenth Amendments. The trial court denied this motion. In addition, the trial court denied Petitioner's motion to consolidate the thirty-three indictments into a single-count indictment.

At trial, the parties stipulated to most of the relevant facts. It was stipulated that the building at 13772 Warwick Boulevard had been owned by KMA since 1978 and that Wall Distributors, Inc., subleased the property under an assignment dated June 4, 1982, from the original lessee, Crusader Enterprises, Inc. The business on the premises

had been operated by each tenant under the name "Book Boutique." It was further stipulated that each of the 33 films on which the indictments were based was obscene, that each was on a separate projector at the time of seizure, and that each had been viewed by customers of the tenant.

A jury convicted Petitioner on all charges and fixed punishment at a fine of $1,000 for each offense, for a total fine of $33,000. The trial court entered judgment on the verdict.

KMA appealed these convictions to the Supreme Court of Virginia on the following issues: 1) Section 27-4(2) of the Newport News Code imposed a prior restraint upon expression in violation of the First Amendment to the United States Constitution; 2) the trial court erred in refusing to dismiss the indictments that failed to allege the essential element of scienter; and 3) the failure of the trial court to consolidate the thirty-three indictments into a single indictment violated the prohibition against double jeopardy. The Supreme Court of Virginia affirmed all of the convictions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

NEWPORT NEWS CITY CODE SECTION 27-4(2), BOTH ON ITS FACE AND IN ITS APPLICATION, CREATES AN INFORMAL SYSTEM OF PRIOR RESTRAINT BY REQUIRING LANDLORDS TO REGULATE THE CONTENTS OF A TENANT'S STOCK OF PRESUMPTIVELY PROTECTED SPEECH MATERIALS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner KMA was charged and convicted of thirty-three violations of Newport News City Code Section 27-4(2) which reads as follows:

> It shall be unlawful for any person to knowingly:... (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

It is Petitioner's contention that Section 27-4(2) represents a classic example of an impermissible prior restraint, and hence, the ordinance must be struck down and Petitioner's convictions reversed.

It is undisputed that obscenity is not speech protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, *reh. denied*, 414 U.S. 881 (1973); *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957). However, it is equally well established that all speech material is presumptively protected by the Constitution until a final judicial determination of obscenity is made. *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973); *Roaden v. Kentucky*, 413

U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). "It... is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to the prurient interest," *Roth v. United States*, *supra*, 354 U.S. at 488. Thus, a municipality "is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). Rather, "the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separate from obscenity only by a dim and uncertain line.' " *Blount v. Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

In determining the existence of an impermissible prior restraint, we begin with the premise that:

> Any system or prior restraint ... 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S. [58] at 70, 9 L.Ed.2d 584; *New York Times Co. v. United States*, 403 U.S. [713] at 714, 29 L.Ed.2d 822; *Organization For a Better Austin vs. Keefe*, 402 U.S. 415, 419, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1971); *Carroll v. Princess Anne*, 383 U.S. 175, 181, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. [659] at 716, 75 L.Ed. 1357. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle

> them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958). *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975) (Emphasis in original).

Near v. Minnesota, 283 U.S. 657, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) probably best articulates the rationale for the heavy presumption against prior restraints. In overturning the trial court's order enjoining the further publication of a newspaper because of its past offensive content, this Court focused on the historical meaning of freedom of the press and the need for freedom of speech in a free society. The Court quoted Blackstone as stating:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press ... 283 U.S. at 713-14. (Emphasis in original)

The United States Supreme Court recognized that the framers of the Constitution agreed with Blackstone's view that free speech is necessary to a free society and must include prohibitions against prior restraints. James Madison was quoted:

> [T]he great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not

> only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also. 283 U.S. at 714.

This statement of fundamental principles was strong authority that the Constitution required a prohibition against nearly all prior restraints. Equally important to the Court was its own view that prior restraints, if permitted, would provide a means to halt the free exchange of ideas. Moreover, the difficulty of suppressing unprotected speech without inhibiting protected speech supported a prohibition against restraining speech prior to its utterance.

While it was recognized that this prohibition would allow some offensive expression, the Court concluded the alternative created too great a risk of censorship and was, thus, unacceptable. Again, Madison was quoted with approval:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. 283 U.S. at 718.

Thus, the framers of the Constitution recognized that the possibility of abuse of the First Amendment that could give rise to a criminal penalty or civil liability could not justify the restraint of future expression.

Pursuant to this fundamental judicial intolerance for systems of prior restraint, this Court has consistently and repeatedly placed upon the government a heavy burden of establishing a justification for the imposition of a prior restraint. *See e.g. Vance v. Universal Amusement Co.*, 445

U.S. 708, 63 L.Ed.2d 413, 100 S.Ct. 1156 1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 29 L.Ed.2d 822, 81 S.Ct. 2140 (1971); *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965).

With the foregoing principles and precedents in mind, the central focus of the inquiry becomes whether Section 27-4(2) in fact constitutes a system of prior restraint, thus giving rise to a strong presumption against its constitutional validity. In this regard, the ordinance must be examined not in the context of mere matters of form, but rather, it must be examined in the context of its operation and effect. *See Near v. Minnesota*, 283 U.S. 697 (1931). Courts should "look through forms to the substance and recognize that informal censorship may ... inhibit the circulation of publications." *Bantam Books, Inc. v. Sullivan, supra*, 372 U.S. at 67.

The operation and effect of Section 27-4(2) is readily apparent, and in a constitutional sense, presents the very threat to freedom of speech that the First Amendment sought to avert. While it is recognized that a city may impose criminal liability upon the seller or distributor of obscene materials, the challenged ordinance extends such liability to a person leasing or even merely lending a building to such a seller or distributor. The extension of criminal liability to the lessor places that person in the position of having to monitor and regulate the contents of the *tenant's* business in order to comply with the law. In effect, the landlord is required by law to become an unofficial censor of what the *tenant* can and cannot sell. Thus, if a landlord leases property to a convenience store with the

knowledge that the store sells *Penthouse* and *Hustler* magazines, the landlord will be required to monitor the contents of these magazines each month and make a determination of whether they are obscene.

Moreover, while the criminal offense of the sale or distribution of obscene material directly advances the legitimate government interest of ending the distribution of obscene material, the challenged ordinance advances that interest only in a haphazard and arbitrary manner by forcing the lessor of a building to act as judge, jury and policeman to avoid criminal liability. The lessor is expected to determine what is obscene and then prevent that type of material from being sold at the *tenant's* business. The effect of the ordinance is to transfer the regulation of presumptively protected speech material out of the realm of the state into the hands of a private citizen simply by virtue of the fact that the individual is the lessor of a building. Thus, a *lessor* is required to determine if *Penthouse* and *Hustler* magazines are obscene and take steps to prohibit their sale from a *tenant's* establishment if the *lessor* determines they are obscene. It is absurd to suggest that the landlord of a piece of property is specially qualified to be appointed the unofficial censor of presumptively protected speech materials that require a formal judicial determination of obscenity to lose the protections of the First Amendment.

Clearly, this ordinance places an overwhelmingly onerous burden upon lessors and landlords who rent their premises to any type of bookstore or theatre. A lessor should not be expected to determine what is, in fact, obscene when that determination has troubled the courts of this nation for years. As a result, property owners will simply refuse to lease their property to any seller or

distributor of books and films. This informal *de facto* censorship will result in the restraint of all manner of materials that definitely fall within the protections of the First Amendment. Moreover, this prior restraint of speech material by property owners, precipitated by fear of prosecution under the challenged ordinance, will result in final and total restraints without any of the procedural safeguards required to assure the free and open exchange of ideas.

As seen, the challenged ordinance is nothing less than an informal system of censorship that acts to restrict the dissemination of protected speech material. Such informal prior restraints have been struck down in many cases. *Southeastern Promotions, Ltd. v. Conrad, supra; Bantam Books, Inc. v. Sullivan, supra; Penthouse Int'l, Ltd v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *American Civil Liberties Union v. City of Pittsburgh*, 586 F.Supp. 417 (W.D. Penn. 1984).

In a well-reasoned opinion addressing precisely the same issue that now confronts this Court, the Louisiana Supreme Court found a statute virtually identical to Section 27-4(2) unconstitutional on its face on the basis that the statute imposed an impermissible prior restraint on presumptively protected expression:

> As we understand the oral reasons assigned by one of the district judges, he agreed with the defendants' contentions that La.R.S. 14:85.1 (Letting premises for obscenity) is unconstitutional on its face and L.R.S. 14:105 (Letting a disorderly place) is unconstitutional as applied to obscenity, *because they constitute an invalid system of prior restraint of expression*. We conclude that the district judge was correct.

* * * *

[The] operation and effect [of the statutes] are clearly seen by the nature and wording of the statutes themselves. The object of the statutes in prohibiting owners from letting or allowing use of the premises for the purpose of obscenity is not merely the punishment of an offending landlord, but the suppression of offensive publications by forcing all property owners to refuse the use of their premises to potential distributors. *Extending far beyond the target of the legislation, the statutes operate to discourage the letting of premises for dissemination of any materials which even arguably constitute obscenity and to encourage closing a bookstore if even a small part of its publications is obscene.* Since a landlord may be charged without a judicial finding of probable cause that publications sold from his premises are obscene, the effect of the statutes is to force landlords and tenants to consult the local prosecutor with regard to leasing and publications, thus casting that official in the role of censor of these activities. In sum, the operation and effects of the statutes are manifold: *the existence of the laws alone will discourage many landlords from letting premises for the sale of publications, obscene and otherwise; regulation of other property owners' leasing policies, and the publications sold by their tenants, will result from de facto censorship by local law enforcement authorities; charges filed against those who fail to consult or heed the officials may compel bookstore closures.* The prior restraint upon publication which results from any of these checks is apt to be broad and final, since the statutes do not provide for any procedural safeguards designated to obviate the dangers of a censorship system. *State of Louisiana v. Franzone*, 384 So.2d 409, at p. 411, 412 (La. 1980) (Emphasis added).

Undoubtedly, the prior restraint found in *Franzone* is precisely the type of prior restraint created by Section 27-4(2).

The Virginia Supreme Court, in its opinion below, distinguishes *Franzone* on the basis that, unlike the situation in Newport News, a landlord in Louisiana could be charged without a finding of probable cause. This analysis is erroneous. To begin with, the Supreme Court of Louisiana merely mentioned the lack of a determination of probable cause in a single sentence, and in reading the opinion in its entirety, it is abundantly clear that this had absolutely nothing to do with the court's conclusion that the statute was unconstitutional *"on its face."* 384 So.2d 409 at p. 412 (Emphasis added). Rather, the court based its decision repeatedly on the fact that the very "existence of the laws alone will discourage many landlords from letting premises for the sale of publications, obscene and otherwise." *Id.* at p. 412.

The Louisiana Supreme Court in *Franzone* continuously, and in depth, focused on the operation and effect of a law prohibiting landlords from knowingly permitting the use of their premises for obscenity, and concluded that the prior restraint inherent in such a law was *"manifold."* The Louisiana Supreme Court then proceeded to articulate *several* effects of the statute on freedom of expression, and specifically stated that *"any"* of those effects was sufficient to constitute an impermissible prior restraint. 384 So.2d at p. 412. (Emphasis added).

The Virginia Supreme Court, in the opinion below, upheld the ordinance on the basis that it was "a criminal law which punishes unlawful conduct after it occurs rather than restraining protected speech before a determination that it is obscene." 323 S.E.2d 78 at 83. However, in making this distinction the Virginia Supreme Court completely failed to examine the actual effect of the ordinance requiring a landlord to act as a censor of what presumptively

protected speech materials a tenant may exhibit or distribute.

In *Vance v. Universal Amusement Co*, 445 U.S. 308, 63 L.Ed.2d 413, 100 S.Ct. 1156 (1980) this Court held that an injunction statute restraining the exhibition of motion pictures was an unconstitutional prior restraint. Justice White, in dissenting from that holding, stressed the distinction between a prior restraint and criminal statutes prohibiting obscenity:

> Prior restraints are distinct from, and more dangerous to free speech than, criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punished for disobeying the censor even though his speech was protected. *Vance v. Universal Amusement Co.*, 445 U.S. 308, at 324; 63 L.Ed.2d 413; 100 S.Ct. 1156 (1980) (J. White dissenting joined by J. Rehnquist).

In the instant case, the challenged ordinance places a landlord in the position of an unofficial censor. From that position, a landlord may "through caprice, mistake, or purpose" prohibit the exhibition of protected speech materials by a *tenant* and punish a *tenant* economically by terminating the lease even if the speech is protected. As such, Newport News Ordinance 27-4(2) poses precisely the same danger to free expression as the prior restraint defined by Justice White above. Therefore, the Virginia Supreme Court was incorrect in finding that the challenged ordinance was a criminal law proscribing past behavior rather than a prior restraint of expression.

Moreover, none of the "procedural safeguards designed to obviate the dangers of a censorship system" exist under

the challenged ordinance. *Freedman v. Maryland*, 380 U.S. 51, 58, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). The Virginia Supreme Court, in the opinion below, attempts to justify the procedures employed by classifying the challenged ordinance as a criminal law. However, as seen, the operation and effect of Section 27-4(2) requires a landlord to become an unofficial censor. This Court has repeatedly stated that a prior restraint on expression must comply with stricter procedural guidelines than any criminal limitation on expression:

> *The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.* Behind the distinction is a theory deeply etched in our law; a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. (Emphasis added) *Southeastern Promotions v. Conrad*, 420 U.S. at 558-559.
>
> * * * *
>
> [T]he burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication. (Footnote omitted). *Vance v. Universal Amusement Co.*, 445 U.S. at 315-316.

The Supreme Court of Louisiana in *State v. Franzone*, 384 So.2d 409 (La. 1980) recognized that stricter procedural safeguards were required to justify a prior restraint on expression:

> A system of prior restraint is invalid unless (1) there is assurance the government official imposing the restraint will, within a specified brief period, either allow publication or proceed immediately in court to restrain publication; (2) any

> restraint imposed in advance of a final judicial determination on the merits is similarly limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and (3) the procedure assures a prompt final judicial decision to minimize the impact of possibly erroneous governmental action. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). *The statutes at issue in the present cases are therefore invalid prior restraint systems because they tend to effectuate large-scale suppression of bookstores and book sales without providing any of the enumerated procedural safeguards.* Accordingly [Louisiana Revised Statute] 14:85.1 is unconstitutional on its face and [Louisiana Revised Statute] 14:105 is unconstitutional insofar as it applies to letting or allowing premises to be used for obscenity. *State v. Franzone*, 384 So.2d 409, at 412 (La. 1980). (Emphasis added)

Precisely the same situation exists in the instant case. Newport News Ordinance Section 27-4(2) effectively creates an informal system of prior restraint upon retailers of presumptively protected books and films without providing any of the procedural safeguards required by the consistent and unequivocal decisions of this Court. Any procedural safeguards included within the criminal process are not sufficient to obviate the dangers of such a system of censorship. Therefore, as in *Franzone*, the challenged ordinance is unconstitutional on its face.

As seen, Newport News City Code Section 27-4(2) places the burden of regulating the sale and exhibition of presumptively protected speech material on the lessor of

property. This ordinance informally restricts speech and thus, attempts to avoid the procedural safeguards required by the consistent and unequivocal decisions of this Court. However, there can be little dispute that the restraint of future expression imposed by this ordinance is the same type of prior restraint ejected by this Court so forcefully in *Near v. Minnesota*.

II

THE TRIAL COURT DENIED PETITIONER'S MOTION TO CONSOLIDATE THE THIRTY-THREE INDICTMENTS INTO A SINGLE INDICTMENT IN VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

Petitioner was charged with, and convicted of, thirty-three separate violations of Section 27-4(2) of the Newport News City Code. The maximum penalty of $1,000 fine was imposed for each of the 33 convictions, thus totalling $33,000. Prior to trial, the Petitioner argued that the allowable unit of prosecution for the instant case was a single indictment, alleging but a single criminal violation. Pursuant to that argument, the Petitioner requested that the trial court consolidate the 33 indictments to reflect a single criminal offense. This Motion was denied by the trial court, without discussion, and without any explanation. *See* Appendix, p. A23.

In determining whether the trial court erred in implicitly finding that the allowable unit of prosecution for the instant case was 33 separate indictments, it is perhaps appropriate to once again review the language of Section 24-4(2). That Section provides:

> It shall be unlawful for any person to knowingly:... (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let,

> lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

According to the indictments, the Petitioner owned a building, and permitted that building to be used for the purpose of presenting 33 obscene exhibitions. Each of the 33 indictments alleges the date of the offense to be "on or before the 10th day of June, 1982." It is beyond dispute that the Petitioner "owned" the building in question only once, and leased that building to the party allegedly exhibiting the obscene films only once. Presumably, the trial court's justification for allowing 33 separate indictments against the owner of the building arose from the number of films shown *by the tenant* of that building.

It has long been the law that the allowable unit of prosecution lies within the discretion of the legislature, subject only to constitutional limitations. However, when the legislature fails to define the criminal unit, or the legislative intent in this regard is ambiguous, such a determination must be made by the courts; and in making such a determination, any ambiguity should be resolved in favor of the criminal defendant. *Bell v. United States*, 349 U.S. 81, 99 L.Ed. 905, 75 S.Ct. 620 (1955).

In *Bell*, often cited as the landmark case regarding the allowable unit of prosecution, the issue was whether the simultaneous interstate transportation of two women in violation of the Mann Act constituted two offenses or only one. The United States Supreme Court remarked:

> When Congress has the will it has no difficulty in expressing it ... when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick

> in a faggot a single criminal unit. When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, *the ambiguity should be resolved in favor of lenity*. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.* This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, *doubt will be resolved against turning a single transaction into multiple offenses* when we have no more to go on than the present case furnishes. 349 U.S. at 83-84 (Emphasis added).

The prohibition against exceeding the allowable unit of prosecution, which was the central issue before this Court in *Bell*, is based upon the constitutional prohibition against double jeopardy, and upon the recognition that it is the legislative branch, not the prosecuting attorney, that establishes and defines criminal offenses. In this respect, it is crucial to bear in mind that "the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid the limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units..." *Brown v. Ohio*, 432 U.S. 161, 169, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

At best, Section 27-4(2) is ambiguous with respect to the allowable unit of prosecution. This fact alone requires the ambiguity to be resolved in favor of the Petitioner, *See Bell v. United States, supra*, and prohibits, pursuant to

constitutional guarantees against Double Jeopardy, the prosecutor from avoiding "the limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units..." *Brown, supra.*

The same issue was addressed in *State v. Cimino*, 33 Conn.Sup. 681, 366 A.2d 1168 (1976) where it was held that the sale of four obscene magazines wrapped together and sold as a package constituted only a single offense of promoting obscenity. In a well reasoned opinion, the court discussed this issue:

> The classic test of multiplicity is whether the legislative intent is to punish individual acts separately or to punish only the course of action which they constitute. *Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 76 L.Ed. 306. Here we are concerned with a single act of promoting obscenity by selling one package containing four magazines. If the contention were sound that more than one offense might be spelled out of that action of the defendant, why were separate counts not used for each lewd photograph or article included in each magazine? The reductio ad absurdum illustrates the soundness of the principle that *the same act cannot constitute the same offense more than once, although it may give rise to more than one offense where it encompasses elements of different crimes. State v. Andrews*, 108 Conn. 209, 215, 142 A.840. *Unless a clear intention to fix separate penalties for each obscene item involved is expressed in the statute, the issue should be resolved against turning a single transaction into multiple offenses. Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905. 366 A.2d at 1171. (Emphasis added).

See also State v. Hungerford, 278 So.2d 33 (La. 1973). Thus, since no clear intent exists to fix separate penalties for each obscene exhibition in Section 27-4(2), the 33 indictments

should be consolidated into a single indictment.

The Virginia Supreme Court, in the opinion below, states that the language of Newport News City Code Section 27-4(2) is not ambiguous based upon the language of Section 27-4(1) which prohibits the presentation of "any obscene exhibition or performance." However, the gravamen of the offense contained in Newport News City Code 27-4(2) is the ownership and leasing of property and not the exhibition of obscene films by the *tenant*. The ordinance seeks to prohibit *landlords* from leasing their property to certain types of businesses. In the instant case, the Petitioner owned the building only once, and leased that building only once to a *tenant* who allegedly exhibited obscene films. Thus, since the gravamen of the offense is the leasing of property, and not the exhibition of films by the tenant, only one offense could have occurred.

This reasoning was followed by the Georgia Court of Appeals in *Adult Bookmart, Inc. v. State*, 152 Ga.App. 838, 265 SE2d 273 (1979). There, two charges were filed where a sale of two obscene magazines by one seller to one buyer occurred in a single transaction. The Court held that:

> [T]he gravamen of the particular offense under consideration is selling obscene material and there was only one sale. It follows that *if there was only one sale, there was only one offense.* (Emphasis added). 264 SE2d at 274.

Under this analysis, since there was only one lease in the instant case, only one offense could have occurred.

Apart from any ambiguity that may exist with respect to the legislative intent regarding the allowable unit of prosecution, decisions rendered by the United States Supreme Court remove any doubt that the Petitioner

herein has been subject to unconstitutional double jeopardy. The most recent definition of the test of identity of offenses, for double jeopardy purposes, was articulated by the United States Supreme Court in *Brown, supra.* In *Brown*, it was held that unless each of two criminal statutes requires proof of an *additional fact which the other does not*, the double jeopardy clause prohibits successive prosecutions *as well as cumulative punishments.*

In a case, almost precisely on point with the instant case, a Georgia Court in *Maxwell v. State*, 152 Ga.App. 776, 264 SE2d 254 (1979) held that the exhibition of several obscene films at a single theatre showing violated only one count of the Georgia Obscenity Statutes. There the court stated:

> The United States Supreme Court has held that unless otherwise provided by statute, a defendant convicted under an indictment charging two or more distinct offenses may be punished for both or all, if each offense requires proof of some fact or element not required to establish the other offense. However, for separate offenses charged in one indictment to carry separate punishments, they must rest on distinct criminal acts. If they were committed at the same time and place and part of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment. 264 SE2d at 256.

See also Commonwealth v. Beacom Distributors, 14 Mass.App. 577, 441 NE2d 541 (1982); *Playmate Cinema, Inc. v. State*, 154 Ga.App. 871, 269 SE2d 883 (1980); *State v. Getman*, 293 Minn. 11, 195 NW2d 827 (1972) *vacated on other grounds*, 413 U.S. 912 (1973); *State v. Carlson*, 291 Minn. 442, 192 NW2d 421, 429 (1971).

Petitioner herein was convicted of thirty-three separate violations of the same ordinance, each violation occurring "on or about the 10th day of June, 1982." Moreover, all thirty-three films were exhibited at the same location at the same time as part of the operation of one business. As the cited authorities indicate, Petitioner cannot be prosecuted several times for the same criminal act without violating the prohibition against Double Jeopardy. Indeed, few cases present a situation as illustrative of double jeopardy than that which now confronts this Court in the instant case.

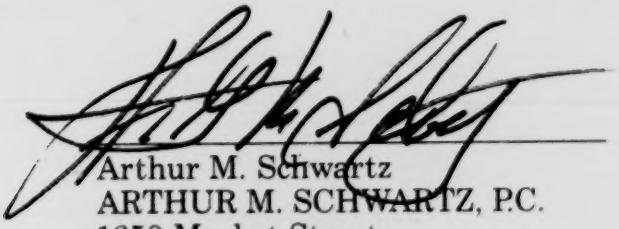
CONCLUSION

Rule 17.1 of the Supreme Court Rules states that review on a writ of certiorari will be granted only when "special and important reasons" exist to do so. Subsection (b) provides that one significant reason to grant a writ exists when the last court of resort in two states have decided a federal question in a conflicting manner. As seen, the opinion of the Virginia Supreme Court in the instant case is in direct conflict with the Louisiana Supreme Court's decision in *State v. Franzone*, 384 So.2d 409 (La. 1980). In addition, the Virginia Supreme Court's decision in the instant case determined all of the issues raised in this petition in a manner that is in conflict with the consistent decisions of this Court.

Therefore, since special and important reasons exist for this Court to review the Virginia Supreme Court's decision in this case, Petitioner respectfully requests this Court to grant this petition for writ of certiorari. In addition, based upon the foregoing authorities, Petitioner requests this Court to declare Newport News City Ordinance 27-4(2) unconstitutional and reverse the decision of the Virginia

Supreme Court. In the alternative, Petitioner requests this court to reverse Petitioner's convictions as violative of the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,



Arthur M. Schwartz
ARTHUR M. SCHWARTZ, P.C.
1650 Market Street
Denver, Colorado 80202
(303)893-2500

Present: All the Justices

KMA, INC.[1]

-v- Record No. 830875

CITY OF NEWPORT NEWS

OPINION BY JUSTICE GEORGE M. COCHRAN

November 30, 1984

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS
J. Warren Stephens, Judge

KMA, Inc. (KMA), was charged in each of 33 indictments, as amended, with knowingly owning a building and permitting it to be used for the purpose of presenting an obscene performance in violation of Section 27-4(2) of the Newport News City Code.[2] A jury found KMA guilty as charged and fixed its punishment at payment of a fine of $1,000 for each offense. The trial court entered judgment on the verdict.

At a pretrial hearing, KMA moved to dismiss the original indictments on the grounds that they failed to include the element of scienter and that the ordinance creates a system of prior restraint of protected speech in

---

[1]The record shows that the corporation was incorporated as K.M.A., Inc. Throughout this litigation, however, it usually has been referred to as KMA, Inc.

[2]Section 27-4(2) of the Newport News City Code provides:

> It shall be unlawful for any person to knowingly:... [o]wn, lease, or manage any theatre, garden, building, structure, room or place and lease, let, lend, or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

violation of the First Amendment. The trial court overruled the motion but permitted the City to amend the indictments to include the word "knowingly" in the allegation of each indictment. Finally, the court denied KMA's motion to consolidate the 33 charges into one single-count indictment. On appeal, KMA argues that each of these actions of the trial court constituted reversible error.

At trial, most of the relevant facts were stipulated. It was stipulated that the building at 13772 Warwick Boulevard had been owned by KMA since 1978 and that Wall Distributors, Inc., subleased the property under an assignment dated June 4, 1982, from the original lessee, Crusader Enterprises, Inc. The business on the premises had been operated by each tenant under the name "Book Boutique." It was further stipulated that each of the 33 films on which the indictments were based was obscene, that each was on a separate projector at the time of seizure, and that each had been viewed by customers of the tenant.

Evidence established that Donna Gallagher signed the application for a 1982 business license as authorized agent for Crusader Enterprises, Inc. She was listed as president, secretary, treasurer, and one of the two directors of KMA on the 1981 Annual Report of that corporation filed with the State Corporation Commission. The investigating officer of the Newport News Police Department identified Thomas Francis Hughes as an employee of the "Book Boutique" when it was operated by Crusader Enterprises, Inc., and subsequently when it was operated by Wall Distributors, Inc. Hughes was listed as the other director of KMA on the 1981 Annual Report.

The record shows that Crusader Enterprises, Inc., had been convicted of violations of the obscenity ordinance and

had failed to pay the fines imposed upon it. The sheriff, therefore, had levied upon all personal property of that corporation located at 13772 Warwick Boulevard to satisfy the judgment. By order entered June 8, 1982, the trial court directed the sheriff to remove such personal property from the premises and sell what was not obscene material. It is uncontroverted that the 33 films now in issue were included in the property upon which the sheriff levied. It is also uncontroverted that before the charges were initiated in the present case, there was a finding of probable cause made by a magistrate.

1. Scienter.

KMA argues that the indictments were constitutionally deficient for failure to allege scienter. If they were void, of course, they could not be amended.

Wall Distributors v. Newport News, 228 Va. S.E.2d (1984), this day decided, is controlling. As we there held, although scienter is an essential element of the crime charged under the obscenity ordinance, failure expressly to allege knowledge in the body of the indictments did not render them void. Because the indictments adequately described the offense charged and cited and incorporated by reference the ordinance defining the proscribed conduct, they complied with the requirements of Code § 19.2-220 and Rule 3A:7(a) (renumbered and amended as Rule 3A:6(a), effective July 1, 1984). As the indictments were valid, the amendment adding the word "knowingly" was permissible, albeit unnecessary. The amendment neither changed the nature or character of the offense charged nor resulted in surprise or prejudice to the accused.

2. Prior restraint.

KMA argues that the ordinance is facially unconstitutional because it forces property owners to monitor and regulate the contents of materials distributed by their tenants.[3] KMA says that the ordinance results in *de facto* censorship by landlords who fear criminal prosecution and therefore refuse to lease their buildings to operators of bookstores and theaters. This argument is without merit. The ordinance merely prohibits a landowner from knowingly leasing his property or permitting it to be used for the purpose of violating a local criminal law.

The First Amendment does not afford protection to those who disseminate obscene materials in violation of the criminal laws. Thus, a legitimate governmental interest in regulating commerce in obscene materials has been validated where the obscenity determinations under the regulatory provisions comply with the constitutional standard enunciated in *Miller v. California*, 413 U.S. 15, 36-37, *reh. denied*, 414 U.S. 881 (1973), and *Roth v. United States*, 354 U.S. 476, *reh. denied*, 355 U.S. 852 (1957). *See, e.g., Hamling v. United States*, 418 U.S. 87, *reh. denied*, 419 U.S. 885 (1974) (statute prohibiting mailing of obscene materials); *Miller, supra* (statute prohibiting mailing of unsolicited obscene materials); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, *reh. denied*, 414 U.S. 881 (1973) (statute prohibiting distribution of obscene materials); *Kaplan v. California*, 413 U.S. 115, *reh. denied*, 414 U.S. 881 (1973) (statute

---

[3]It is irrelevant in the analysis of the issue of prior restraint in violation of the First Amendment that the films were stipulated to be obscene. If a prior restraint exists, its impact extends to any materials whose dissemination is impeded without the required constitutional safeguards. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975).

prohibiting distribution of obscene materials); *United States v. 12 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1973) (statute prohibiting importation of obscene materials for private use); *United States v. Orito*, 413 U.S. 139 (1973) (statute prohibiting transportation of obscene materials in interstate commerce). The Commonwealth of Virginia, in the exercise of its police power, may properly determine that public exhibition of or traffic in obscenity may be contrary to the public interest. *See Paris Adult Theatre*, 413 U.S. at 69. The Commonwealth, acting through the General Assembly, has made such a determination in enacting the state obscenity laws and authorizing local governing bodies to adopt similar local ordinances. Code §§ 18.2-372, *et. seq.*

In the enforcement of obscenity laws, a state or locality may seize single copies of films to preserve them for use as evidence, particularly where the seizure does not prevent continued exhibition of the films. *Heller v. New York*, 413 U.S. 483 (1973). In that case, the Supreme Court held:

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.

Id. at 492 (footnote omitted). *Cf. Roaden v. Kentucky*, 413 U.S. 496 (1973), where the Supreme Court held that seizure of a film by a police officer "without the authority of a constitutionally sufficient warrant" was a form of unreasonable prior restraint. *Id.* at 504.

KMA does not challenge the City's compliance with the seizure procedures required by *Heller* and *Roaden*. KMA attacks the ordinance, however, as an informal mechanism for prior restraint which fails to provide for prompt judicial

resolution of the obscenity issue and a prompt final determination.

KMA cites *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980), as an example of an informal system of prior restraint that violates the First Amendment. In *Penthouse*, McAuliffe, the Solicitor General of Fulton County, Georgia, pursued a course of conduct designed to rid Atlanta of certain magazines sold at newsstands, food stores, and drug stores. Investigators under his direction arrested vendors without warrants upon the officers' own cursory examinations of the magazines. Statements by McAuliffe printed in local papers indicated he intended to continue to arrest those selling "obscene materials." In response, the region's wholesale distributor of most of the magazines advised all its retailers to remove the magazines from their shelves. Where the magazines were still sold, warrantless arrests of the vendors continued. 610 F.2d at 1357-58.

The appellate court held that the threat of prosecution through a scheme of newspaper announcements, systematic visits to magazine retailers, and warrantless arrests without an independent judicial determination of obscenity constituted a prior restraint. Removal of the magazines from store shelves in light of these threats was not voluntary. *Id.* at 1360. The court also held that the "constructive seizure" caused by McAuliffe's activities failed to meet the *Heller/Roaden* test for constitutionality. *Id.* at 1362.

Penthouse is distinguishable from the present case. No "constructive seizure" of materials is effected by enforcement of the Newport News ordinance. The ordinance creates no threat that landlords will be prosecuted without a prior judicial determination of obscenity. There is nothing

in the record to suggest that KMA sought return of the films or an expedited determination of obscenity. There is only the stipulation of obscenity. On the record before us, the availability to KMA of a prompt final determination cannot successfully be challenged.

KMA seeks to have us apply the safeguards against unconstitutional prior restraints required by the Supreme Court in civil proceedings for the absolute suppression of allegedly obscene materials. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975). But the Court said in that case:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.

Id. at 558-59.

KMA relies heavily upon *State v. Franzone*, 384 So.2d 409 (La. 1980), in arguing that the Newport News ordinance creates an unconstitutional system of prior restraint because it requires landlords, to avoid the risk of criminal prosecution, to censor the materials distributed by their tenants in bookstores and theaters. In *Franzone*, the Louisiana Supreme Court held facially unconstitutional two statutes forbidding an owner from knowingly leasing or allowing use of his property for the practice of obscenity. The reasoning of the court was this:

> Since a landlord may be charged without a judicial finding of probable cause that publications sold

> from his premises are obscene, the effect of the statutes is to force landlords and tenants to consult the local prosecutor with regard to leasing and publications, thus casting that official in the role of censor of these activities.

Id. at 412.

That rationale is not applicable here because KMA was not charged, nor could it have been charged, without a determination of probable cause made by a neutral and detached magistrate. The fears expressed by the Louisiana court in *Franzone* are unjustified in Virginia. The Newport News ordinance is a criminal law which punishes unlawful conduct after it occurs rather than restraining protected speech before a determination that it is obscene. The ordinance places no affirmative duty on a landlord to determine the nature of materials disseminated by a tenant. It merely imposes a criminal sanction on the landlord who purposefully allows his property to be used for distribution of obscenity or, after becoming aware of such use, continues to permit the illegal activity.

Moreover, the ordinance no more requires an innocent landlord to determine the content of materials distributed on his premises than statutes proscribing knowing sales of obscene materials require an innocent bookseller to ascertain the content of all the materials he sells. In each instance, the applicable test is whether the defendant had knowledge of or reason to know of the character and content of the material. *See Hamling v. United States, supra*, 418 U.S. at 123.

We hold that the ordinance is facially constitutional and that it was constitutionally applied in this case under the First Amendment and also under Article I Section 12 of the Virginia Constitution.

3. Multiple indictments.

KMA argues that the trial court erred in denying its motion to consolidate the 33 indictments into a single indictment. As amended, each indictment charged that KMA knowingly owned a building and permitted it to be used for the purpose of presenting an obscene motion picture therein described. The same language of each indictment was used in the form of verdict returned by the jury. KMA says that the evidence required to prove each of the 33 charges is the same. If this is correct, there was only one offense and the prosecution for multiple offenses violated the constitutional guarantee against double jeopardy. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Section 27-4 of the Newport News Code, dealing with obscene exhibitions and performances, comprises two subsections. Section 27-4(1) makes it unlawful knowingly to "present ... any obscene exhibition or performance, including the exhibition or performance of any obscene motion picture." Section 24-4(2) makes it unlawful knowingly to "[o]wn ... any ... building ... and lease ... or permit such ... building ... to be used for the purpose of presenting such obscene exhibition or performance."

In *Educational Books, Inc. v. Commonwealth* (Record No. 831830, this day decided), we held that under the provisions of Code § 18.2-374, prohibiting the sale of "any obscene item," the sale of each one of a number of obscene magazines constituted a separate offense. By the same rationale, under the provisions of Section 27-4(1), prohibiting the presentation of "any obscene exhibition or performance," the presentation of each one of a number of obscene motion pictures would constitute a separate offense. Aside from the legislative intent manifest in the language of the

ordinance, the same evidence is not used where there are multiple charges arising from presentations of different obscene motion pictures. The determination of obscenity must be made on the basis of each film.

In the present case, each indictment required proof that KMA (1) knowingly (2) owned the building and (3) permitted its use (4) for the purpose of presenting an obscene motion picture therein described. Section 27-4(2) makes it unlawful for a person knowingly to own a building and permit it to be used for the purpose of presenting "such obscene exhibition or performance." It is apparent that "such obscene exhibition or performance" refers to the "exhibition or performance of any obscene motion picture" proscribed by Section 27-4(1). Under Section 27-4(1), each exhibition or performance forms the basis of a separate unlawful act. The language of Section 27-4(2), in conformity with that of Section 27-4(1), has the same effect. Each offense charged was knowingly owning a building and permitting its use for presentation of one obscene film, not for presentation of obscene films. The ordinance is directed at each obscene exhibition, rather than at obscene exhibitions collectively.

Because the wording of the ordinance discloses the legislative intent that each obscene motion picture shall constitute the basis for a separate offense, and because the evidence, *i.e.*, the film, was different in each case, we hold that the trial court did not err in denying KMA's motion to consolidate the indictments. Holding as we do that there were 33 separate offenses, it follows that we hold that punishment was properly imposed for each offense. No fine exceeded the maximum amount permitted by law.

For the reasons assigned, we will affirm the judgment of the trial court.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of January, 1985.

KMA, Inc.,

Appellant,

against

Record No. 830875
Circuit Court Nos. 8894-83
through 8926-82

City of Newport News, *Appellee.*

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 30th day of November, 1984, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

MOTION TO DISMISS ON THE BASIS THAT SECTION 27-4(2) OF THE CODE OF THE CITY OF NEWPORT NEWS IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

COMES NOW the Defendant, KMA, Inc., by and through its attorney, and respectfully moves this Court to dismiss the indictments in the above and foregoing criminal matter on the basis that Section 27-4(2) of the Code of the City of Newport News is unconstitutional on its face, and as applied.

AND AS GROUNDS FOR SAID MOTION, Defendant alleges as follows:

1. The Defendant is currently charged in 33 separate indictments with the violation of Section 27-4(2) of the Code of the City of Newport News.

2. That section, in pertinent part, makes it unlawful for the owner of a building to permit the presentation of an obscene exhibition or performance to occur on his premises.

3. A diligent search of the library fails to reveal a single statute or ordinance of this nature that has withstood constitutional attack.

4. Section 27-4(2), and enactments similar thereto, creates a constitutionally impermissible prior restraint upon expression in the following particulars:

a. The effect of Section 27-4(2) is to suppress explicit, yet constitutionally protected, performances by forcing all property owners to refuse the use of their premises to potential exhibitors.

b. The ordinance operates to discourage the leasing of

premises for the exhibition of any materials which even arguably constitute obscenity, and hence, encourages the closing of premises that operate under the protection of the First Amendment.

c. The effect of the ordinance is to permit the prosecution of a landlord or owner without a judicial finding of probable cause that exhibitions occurring on his premises are obscene, and hence, forces landlords and owners, as well as tenants, to consult local prosecutors with regard to leasing and exhibitions, thus placing that official in the role of censor as to these activities.

d. The existence of Section 27-4(2), alone, operates to discourage the letting of premises for the presentation of performances, obscene or otherwise and thus, epitomizes an impermissible prior restraint.

e. The operation of Section 27-4(2) is to create a de facto censorship by local law enforcement authorities.

f. There are no procedural safeguards to obviate the danger of censorship which is inherent in the ordinance.

5. A copy of a decision *precisely* on point with the instant case is attached hereto and incorporated herein by this reference for the Court's convenience. (*State v. Franzone*, 384 So.2d 409 (La. 1980).

WHEREFORE, the Defendant prays that this Honorable Court dismiss the indictments in the above-captioned criminal matter.

MOTION TO CONSOLIDATE THE 33 CRIMINAL INDICTMENTS INTO A SINGLE INDICTMENT CONTAINING A SINGLE COUNT

COMES NOW the above Defendant, by and through its attorney, and respectfully prays that this Honorable Court consolidate the 33 criminal indictments into a single indictment containing a single count.

AND AS GROUNDS FOR SAID MOTION, Defendant states:

1. The Defendant stands charged with 33 separate violations of City ordinances involving the purported ownership of a building by the Defendant, and the Defendant permitting the premises to be used for the purpose of presenting an obscene exhibition or performance.

2. All of the violations claimed to have occurred flow from activities allegedly transpiring on or before the "10th day of June, 1982."

3. By fragmenting the transaction into 33 separate indictments, the Defendant's rights of speech and expression are chilled, it is forced to defend 33 separate criminal charges instead of 1, it is subjected to 33 criminal sanctions instead of 1, all of this being done in violation of Defendant's first and fourteenth amendment rights guaranteed by the United States Constitution, and those similar provisions of the Constitution of the Commonwealth of Virginia.

4. Defendant affirmatively alleges that if, in fact, a criminal violation did occur, which this Defendant denies, such violation would constitute only a single act and not the 33 acts claimed to have occurred.

WHEREFORE, Defendant respectfully moves this Court for an order consolidating the 33 criminal indictments currently pending against said Defendant into a single indictment containing a single count.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS.

CITY OF NEWPORT NEWS

v

RECORD NO. 8894-82 - 8926-82.

KMA, INC.,
Defendant

Before Hon. J. Warren Stephens, Judge

Newport News, Virginia

March 25, 1983

APPEARANCES: Mr. William C. Johnson,
Assistant City Attorney,
attorney for the City of Newport News.

Messrs. Cumming and Patrick
(Mr. Frederick L. Moschell),
attorneys for the defendant.

THE COURT: Your next motion is motion to dismiss on the basis concerning Section 27-4 of the code. Is that the next one?

All right. You may comment on that one, please.

MR. MOSCHELL: With regard to that motion, again our arguments are well set forth in the written motion itself, and I would ask that the Court address itself to the case cited and which was attached to the motion, that is the State of Louisiana v. Vincent F. Franzone, Supreme Court of Louisiana, 384 Southern 2nd 409, a 1980 case. This is the only case, Your Honor, that I am aware of that has ever addressed this particular issue, and I would submit that it hits on virtually all points of the case before the Court this morning or this afternoon. Now, the Court in Franzone was asked to make a determination upon the State's appeal from judgments below which quashed criminal prosecutions and declared unconstitutional as invalid prior restraints of expression, criminal statutes which forbid property owners to knowingly lease or allow use of premises for obscenity.

Now, when we take a look at our particular city ordinance, Your Honor, that KMA stands charged with, that would be Section 27-4, Subsection 2, KMA is charged with unlawfully—or any person knowingly own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance.

Now, the particular statute addressed in the Louisiana case was Louisiana Statute Section 85.1 which provides that letting premises for obscenity is the granting of the right of use or leasing of any premises knowing that they

are to be used for the practice of obscenity as defined in Code Section 14:106 of the criminal code, Article 106; or allowing the continued use of the premises with such knowledge.

The Court in addressing that particular issue found that that particular section was unconstitutional. It in essence constituted an invalid prior restraint of expression. Your Honor, I don't believe you could get a case much more on point. This case—In the case before the Court this morning or afternoon, KMA is charged as being the owner of a building, not the operator of a building, but the owner of a building, and if an owner of a building is to be subjected to this type of an ordinance, then in essence, Your Honor, it would cause an owner of a building who plans on leasing to any type of bookstore, whether it be for religious materials or any type of materials, it would charge that particular owner of the building to approach a prosecutor, to approach an appropriate city official, before he actually leased his building to make sure he's not going to be prosecuted under this particular section, and he would have to literally present every magazine, every book, every article to the prosecutor to determine whether or not he's in violation of the particular ordinance by leasing the building to somebody that's going to be selling those materials, and in that respect, Your Honor, it constitutes a prior restraint upon First Amendment freedom. It places a—really the prosecutor in the position where he can literally control what is to be sold and what is not to be sold in any bookstore, whether it be an adult shop, or whether it be a library or any store selling religious materials, and in that respect, Your Honor, it does constitute a prior restraint. We are as the Court knows in a very sensitive area of the law right now, and I'm fully aware of the city's feelings with regard to the bookstore. There's quite a bit of animosity. There's quite a bit of

hard feelings because of the series of cases that have been tried before this Court and other courts in the Circuit Court of Newport News, but regardless of those hard feelings and regardless of the ongoing prosecutions and efforts to pierce the corporate veils and every other proceeding that's going on, we are concerned today with a statute, with a city ordinance, with which we have never been concerned before. We are concerned today with charges against the owner of a bookstore who doesn't have a thing to do with running the store. He is just charged with leasing it to somebody, and that's all; and, Your Honor, this is the only case to my knowledge that is on point, and I think it hits right on point. This ordinance constitutes a prior restraint, and for that reason should be held unconsitutional.

THE COURT: All right, sir. Thank you.

Mr. Johnson, you may—

MR. JOHNSON: Your Honor, I think there is another case directly on point. It's another case, Grove Press, another Circuit Court of Virginia case, a 1969 case, and I cite from that case—which the Eastern District of Virginia referred to Section 18.1-230, which is now 18.2-375, which is also Section 27-4(2) of the ordinance for all intense [sic] purposes, and that statute as they stated in that case said that statute provides that every person who knowingly owns, leases or manages any theatre, garden, building, structure, room or place and leases, lets, lends or permits such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance shall be guilty of a misdemeanor. Then they go on and refer to a particular clause in regards to possession being a presumption of guilt, and excludes that particular clause, but they get to the meaning of this particular

issue, and what we have here, and they say we conclude therefore that Virginia Code annotated Section 18.1-230, which is now 375; and Section 27-4(2) of the Newport News ordinance is constitutional. That's what the Eastern District of Virginia has held, and the Louisiana case I thought was at least to me interesting to read because in that particular case they say—if Your Honor wants to follow along, 384 Southern 2nd 412, they say since a landlord may be charged without a judicial finding of probable cause—Well, I'm not aware of how you can be charged with a class one misdemeanor without there being a determination of probable cause. In this particular case which we have before us an arrest warrant, search warrant, was obtained from the independent judicial officers, a magistrate. He determined there was probable cause, and the city then obtained a search warrant, went up and viewed these particular materials, and in the determination of the investigating officer there was probable cause, and then the matters were brought by the prosecution, City Attorney's Office and the Commonwealth's Attorney's Office which again is another judicial body, and they determined then at that particular point only after that particular point that indictments should be issued and charges made. So the argument as far as I'm concerned in the Louisiana case is totally not on point with what we have in Virginia, and I have no idea how anyone in Virginia can be charged with a class one misdemeanor—and that's what we have before us, Your Honor—without there being a determination. In this case there was a twice determination of probable cause by independent judicial officers, and I feel for that reason that the Louisiana case fails, and one other point, and I think it is well taken, Miller versus California—the Louisiana case goes back and refers to cases back in 1930 and talks about the heavy burden that falls upon the state and upon the

prosecution when they're dealing in the area of First Amendment rights, and we have to be careful there's no prior restraint. I remind Your Honor in 413 U.S. 421, Miller versus California, which is the landmark case in this area, the Court there said obscenity is not a—does not fall within the protection of the First Amendment in regards to speech or press, and for that reason, Your Honor, I think that there is no prior restraint in this particular area because first of all we've determined on two—in two steps that there was probable cause to charge this defendant, and that there was no prior restraint because there cannot be prior restraint when you're dealing with an item that's determined to be obscene.

THE COURT: Thank you, sir.

Do you care to rebut?

MR. MOSCHELL: Your Honor, I would just make one comment. I would like to read from the opinion of the Louisiana case.

"The object of the statute in prohibiting owners from letting or allowing use of premises for the purpose of obscenity is not merely the punishment of the offending landlord, but the suppression of the offense publications by forcing all property owners to refuse the use of their premises to potential distributors. The statute operates to discourage the letting of premises for dissemination of any materials which even argumentably constitute obscenity and to encourage closing a bookstore if even a small part of its publication is obscene. The effect of the statute is to force landlords and tenants to consult the local prosecutor with regards to leasing and publications, thus casting that official in the role of a censor of these activities; and that's

exactly what the ordinance for the City of Newport News does, You Honor.

THE COURT: All right. The Court concludes that no prior restraint of expression is involved. Denies and overrules the motion.

MR. MOSCHELL: Please note an exception, Your Honor.

THE COURT: Exception noted.

* * * * *

THE COURT: The fifth motion, the motion to consolidate the thirty-three criminal indictments into a single count, Mr. Moschell, that's the one the Court has next.

MR. MOSCHELL: Yes, sir.

Your Honor, briefly with regard to that particular motion which is I think sufficiently set forth, the activities from which these violations are claimed to have occurred flow from a single action or activity prior to June 10th, 1982. Now, since there are thirty-three films involved here, thirty-three separate films, of course, the city has charged that the defendant has violated the Code Section thirty-three individual times, even though all of these films were seized at the same time. Coincidentally, they were seized to satisfy prior fines levied against Crusader, which is not a party today, and they were ultimately viewed by Detective Parker and another detective on the same day while the films were in the Sheriff's Office. Because they were viewed at the same time, because they were all seized at the same time, we would ask Your Honor that these indictments be reduced to one charge. It is one activity. If—Assuming that the Court feels that thirty-three charges are warranted

here because there are thirty-three films, then you could take it to the inth degree and say there are five thousand frames or whatever number of frames there are on each film that depicts some type of sexuality, and therefore there are five thousand separate charges right there. This is one activity, Your Honor, and the purpose of the city is quite obvious, and that is to have as many charges as it possibly can against the defendant to ultimately put it out of business; and I would suggest, Your Honor, that this is one single investigatory activity by the city, and since it is one activity by the city it is one alleged offense and these charges should be reduced accordingly.

THE COURT: Does the city object to the motion for separate trials?

MR. JOHNSON: (Nodded head affirmatively)

THE COURT: Motion denied and overruled.

The next one the Court has, Mr. Moschell, is the motion to dismiss on the grounds of misinstructions before the grand jury.

MR. MOSCHELL: Your Honor, please note our exception to the Court's ruling.

Now, were you ruling on our motion to consolidate the thirty-three indictments—that was my argument—or were you ruling on the motion for separate trials, or both?

THE COURT: No. I ruled that the motion to consolidate thirty-three criminal indictments into a single count is denied and overruled. The next one is the motion for separate trials.